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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner,

v.

THE STATE OF TEXAS.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 577 S.W.2d 717 (Petition for Writ of Certiorari, Appendix A, pp. 16 *et seq.*)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on January 31, 1979. (Pet.App.A 16) A motion for rehearing was denied on March 21, 1979. (Pet.App.A 16) On June 12, 1979, Mr. Justice Powell extended the time

within which to file a petition for a writ of certiorari to and including August 7, 1979. The petition was filed on August 7, 1979, and was granted on December 10, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Is the doctrine of *Witherspoon v. Illinois,* 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases?

(2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code §12.31(b) violate the doctrine of *Witherspoon v. Illinois,* supra?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life . . . without due process of law . . .

STATEMENT OF FACTS

1. During the voir dire examination of the prospective jurors in this case the prosecutors inquired *seriatim* of each

venire person his or her general attitude regarding the death penalty, his or her qualification to serve on the jury under *Witherspoon v. Illinois,* and his or her qualification to serve on the jury under Section 12.31(b).

The pattern of interrogation used by the prosecutors was to first advise the venire member that the State was seeking the death penalty in this case and then ask the prospective juror to express his or her general 'feelings' about the death penalty. Following such expression, the venire member was interrogated to determine his or her qualification to serve on the jury under *Witherspoon.* The prosecutors then outlined, in general terms, the Texas death penalty procedure, i.e., that there would be a bifurcated trial and that at the punishment phase of the trial the jury would be called upon to answer the three questions prescribed by law.[1] The

---

[1]TEX.CODE CRIM.PRO.ANN. art. 37.071 (Vernon Supp. 1979), provides:

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(continued)

prospective juror was next told that 'yes' answers to all three questions resulted in a mandatory sentence of death, and that a 'no' answer to any one of the questions resulted in the imposition of a life sentence. Finally, the prosecutors read to each venire member the three questions. With all of the foregoing as a predicate, each prospective juror was advised of and interrogated about the oath required by Section 12.31(b).[2] Those venire members who could not state under

(footnote continued from preceding page)

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

[2]TEX.CODE CRIM.PRO.ANN. art. 12.31(b) (Vernon 1974) provides:

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

oath that they would not be affected in their deliberations on any issue of fact by the mandatory penalty of death or life imprisonment were challenged by the prosecution for cause pursuant to Section 12.31(b). In several instances, despite the qualification of a prospective juror under *Witherspoon* standards, and despite the venire member's commitment to answer the three punishment questions honestly, based solely on the facts presented and on the law given by the court, prospective jurors were excused by the trial court at the State's insistence, over the timely and specific objections of the petitioner, pursuant to Section 12.31(b).

2. On appeal the petitioner argued that venire members had been erroneously excluded for cause in violation of *Witherspoon* when the trial court sustained the prosecutors' challenges for cause made under Section 12.31(b) to prospective jurors who were qualified under *Witherspoon.*[3] The Court of Criminal Appeals described the petitioner's claim of error in the following terms. "Specifically, [petitioner] contends that by permitting the application of Sec. 12.31(b), supra, to the three punishment issues specified by Art. 37.071, V.A.C.C.P., the trial court bestowed upon the prosecution a broader basis of exclusion than allowed under the rule of *Witherspoon v. Illinois,* [*supra*]." *Adams v. State,* 577 S.W.2d at 728.

The Court of Criminal Appeals responded to the petitioner's argument thusly:

> . . . this Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas and in particular the application of Sec. 12.31(b), *supra,* to the punishment issues, comports with the constitutional requirements of *Witherspoon.* [Citations omitted.] The trial court did not err in

[3]Appellant's Brief 43-54, *Adams v. State, supra.*

> excluding from the jury those venire members who could not state that their deliberations on the punishment issues would not be affected by the mandatory penalty of death or life imprisonment.

Id.

SUMMARY OF ARGUMENT

I.

A.

The Texas death penalty scheme, as enacted and as construed by the Texas Court of Criminal Appeals, contains considerable jury discretion in the sentencing aspects of capital cases. In order to protect a capital felony defendant's Sixth Amendment right to a jury drawn from a fair, representative cross section of the community, and more particularly to ensure that a jury's punishment decision in a capital case will properly reflect the conscience of the community, it is imperative that persons not be systematically excluded from jury service on any broader basis than allowed by *Witherspoon*. Nothing about the Texas capital punishment procedure, as written, as construed, or as used, eliminates the need for *Witherspoon*-qualified jurors in Texas death penalty cases, or justifies the wholesale exclusion of prospective jurors under the narrow ground for exclusion provided by Section 12.31(b).

B.

This Court has already applied *Witherspoon* to the

Georgia post-*Furman*[3a] capital punishment procedure in *Davis v. Georgia*, 429 U.S. 122 (1976). Since the Texas post-*Furman* death penalty procedure is materially identical to Georgia's *stare decisis* compels application of Witherspoon to the Texas capital punishment scheme.

II.

Based on the voir dire examination of the prospective jurors in this case, it is clear that Section 12.31(b) was used by the prosecution to disqualify at least seven prospective jurors who were qualified under *Witherspoon* standards. While all of these disqualified venire members were unable to swear that they would not be affected in their deliberations of the petitioner's case by the mandatory penalties provided by law (as required by Section 12.31(b)), these prospective jurors all stated that they would not automatically vote against the death penalty regardless of the evidence presented in the petitioner's case.

ARGUMENT

I.

A.

The Texas death penalty scheme survived constitutional attack in *Jurek v. Texas*, 428 U.S. 262 (1976), because it replaced standardless discretionary jury sentencing in capital cases, which was condemned in *Furman v. Georgia*,

[3a] *Furman v. Georgia*, 408 U.S. 238 (1972).

supra, with guided jury discretion.[4] The Texas scheme fulfills the requirement that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed", *Jurek v. Texas, supra*, 428 U.S. at 271, because "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 274. Of critical importance to the *Jurek* decision, and to the proper decision of this case, is the conclusion that the Texas procedure "ensur[es] that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 276.

The sentencing function of the jury in all Texas capital cases[5] is to answer these three statutorily prescribed questions on the basis of the facts presented during both the guilt/innocence phase of the trial and the punishment (sentencing) phase of the trial. The jury's answers to these three questions determine whether the accused receives the death penalty or a sentence of life imprisonment. TEX.CODE CRIM.PRO. ANN. art. 37.071 (b) & (e) (Vernon Supp. 1979). Pursuant

[4]Post-*Furman* capital punishment statutes that have eliminated discretionary sentencing by employing mandatory death sentences in specified types of cases have been declared unconstitutional. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Discretion of some sort in connection with the imposition of the death penalty is thus a constitutional prerequisite to the use of that punishment. *Lockett v. Ohio, supra*, 438 U.S. at 601; *Roberts (Stanislaus) v. Louisiana, supra*, 428 U.S. at 334; *Woodson v. North Carolina, supra*, 428 U.S. at 302-304; *Proffitt v. Florida*, 428 U.S. 242 at 258 (1976); and *Gregg v. Georgia*, 428 U.S. 153 at 189 (1976).

[5]One accused of capital murder in Texas cannot waive a jury trial. TEX. CODE CRIM.PRO. ANN. arts. 1.13 & 1.14 (Vernon 1977); *Ex parte Dowden*, 580 S.W.2d 364 (Tex.Crim.App. 1979).

to Section 12.31(b) all prospective jurors in capital cases are told that the answers to the three punishment questions will result in a mandatory sentence of death or life imprisonment. In discharging its sentencing function "the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment." *Hovila v. State*, 532 S.W.2d 293 at 294 (Tex.Crim.App. 1976). While the jury is not called upon to "bring forth the ultimate verdict", *id.*, the jury knows that the defendant's fate — life or death — is mandated by its answers to the three punishment questions.

Under this procedure a jury in a Texas capital case has significant discretionary input into the ultimate sentence imposed upon an accused, not only because under the Texas procedure the jury is aware of the effect of its answers to the three punishment questions, but also because the Texas Court of Criminal Appeals has given the trial courts wide discretion in admitting or excluding evidence at the punishment hearing[6] and has upheld the imposition of the death

[6]*See, e.g., Gholson v. State*, 542 S.W.2d 395 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977), *reh. denied*, 432 U.S. 882 (1977) (no error in admitting at the punishment hearing the black defendant's notebook containing references to "black power" and "killing whiteys"); *Hovila v. State*, 562 S.W.2d 243 (Tex.Crim.App. 1978), *cert. denied*, 99 S.Ct. 1058 (1979) (no error in excluding at the punishment hearing evidence offered by the defendant that he was mistakenly released from jail following his arrest for capital murder and that while free for four days he remained at his mother's house and committed no crimes); *Hammett v. State*, 578 S.W.2d 699 (Tex.Crim.App. 1979) (no error in admitting unadjudicated offenses attributed to the defendant at the punishment stage of the trial); *Wilder v. State*, 583 S.W.2d 349 (Tex.Crim.App. 1979) (no error in admitting unadjudicated offenses attributed to the defendant at the punishment stage of the trial); *Green v. State*, No. 61914, Tex.Crim.App., October 3, 1979 (no error to admit details of crimes other than the offense charged in the indictment of

(continued)

penalty upon a variety of diverse factual circumstances[7]

(footnote continued from preceding page)

which the defendant had been convicted); *McManus v. State*, No. 58886, Tex.Crim.App., December 5, 1979 (no error in admitting at punishment phase of the trial the testimony of the defendant's former girlfriend that the defendant had attempted to extort her and that the defendant had intended to kill her husband).

This discretion is consistent with this Court's recognition of the need "to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show", *Jurek v. Texas, supra*, 428 U.S. at 272, in connection with the Texas death penalty procedure.

[7]The imposition of the death penalty has been upheld by the Court of Criminal Appeals upon evidence ranging from only the facts established to show the defendant's guilt of the offense charged in the indictment to proof that the defendant had a long history of criminal activity and criminal violence. Contained in this range are numerous cases where the only evidence adduced other than the guilt-facts was the testimony of a psychiatrist predicting the probability of future conduct of the accused, or evidence of unadjudicated offenses, or testimony that the defendant failed to demonstrate any remorse for his capital crime. Additionally, the court has upheld several death sentences imposed upon individuals who, though criminally responsible under Texas law, did not directly participate in the actual murder for which they received the death penalty. Representative of these holdings are the following cases: *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 922 (1977), *rev'd. sub nom. Smith v. Estelle*, 445 F.Supp. 647 (N.D. Tex. 1978), aff'd, 602 F.2d 694 (5th Cir. 1979) (the defendant had a prior marijuana conviction and was not the triggerman in the capital murder); *Livingston v. State*, 542 S.W.2d 655 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977) (the defendant was not the triggerman in the capital murder); *Moore v. State*, 542 S.W.2d 664 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977) (psychiatric testimony that the defendant was a sociopath plus the guilt-facts justified the death sentence); *Shippy v. State*, 556 S.W.2d 246 (Tex.Crim.App. 1977), *cert. denied*, 434 U.S. 935 (1977) (police officer's testimony that the defendant had a bad reputation plus the guilt-facts were held sufficient to justify the death sentence despite psychiatric testimony at the punishment hearing that the defendant's future behavior could not be predicted); *Burns v. State*, 556 S.W.2d 270 (Tex.Crim.App. 1977), *cert.*

(continued)

including one case where the only evidence available to the jury upon which it could base its answers to the three punishment questions consisted of the facts of the capital murder charged in the indictment.[8] That Texas capital case juries are vested with virtually absolute, albeit guided discretion[9] is consistent with Texas' history of providing for jury sentencing in criminal cases,[10] reflecting the generally

(footnote continued from preceding page)

denied, 434 U.S. 935 (1977), *rev'd. sub nom. Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979), reh. granted, 598 F.2d 1016 (5th Cir. 1979) (one prior conviction plus one unadjudicated offense held sufficient to justify death penalty); and *Felder v. State*, 564 S.W.2d 776 (Tex.Crim.App. 1977), *cert. denied*, 99 S.Ct. 1433 (1979) (the defendant had three prior felony convictions for non-violent offenses); *Adams v. State*, 577 S.W.2d 717 (Tex.Crim.App. 1979), *cert. granted, supra*, December 10, 1979 (psychiatric testimony indicating that the defendant was a sociopath, the defendant's having been AWOL while in the military service, and the guilt-facts were held sufficient to justify the death sentence despite the young age and lack of prior criminal record of the defendant); *Armour v. State*, 583 S.W.2d 349 (Tex.Crim.App. 1979) the defendant was the "wheel man" in the capital murder, not the "trigger man", and admitted to having participated in another capital murder two days prior to the one charged in the indictment).

[8]*Earvin v. State*, 582 S.W.2d 794, 798-799 (Tex.Crim.App. 1979).

[9]Under Article 37.071(e), Texas trial courts must invariably accept the jury's answers to the three punishment questions and impose either a life or death sentence depending upon the answers to the questions. Trial courts are not free to disregard the jury's answers to the punishment questions.

[10]Prior to 1966 the jury assessed the sentence in all criminal cases in Texas, except in those cases where the punishment was fixed by law, unless the accused waived a trial by jury. TEX.CODECRIM.PRO. art. 693 (1925); 3 Vernon's Ann.Code Crim.Pro. 629, "Special Commentary" (1966). Since an accused has never been able to waive a trial by jury in a capital case in Texas, n. 5, *supra*, it has been the consistent historical requirement in Texas that only a jury impose the sentence in a capital case.

recognized awareness of the important societal function performed by juries. "The jury is a significant and reliable objective index of contemporary values because it is so directly involved." *Gregg v. Georgia, supra,* 428 U.S. at 181. Juries are the representatives and conscience of the community and are called upon to reflect the community's sense of justice in a given case. *Ballew v. Georgia,* 435 U.S. 223, 238 (1978); *Taylor v. Louisiana,* 419 U.S. 522, 527-530 (1975); *Duncan v. Louisiana,* 391 U.S. 145, 151-152, 156-157 (1968). The sentencing discretion reposed in Texas juries in capital cases is symptomatic of what this Court said in *Witherspoon:*

> [O]ne of the most important functions any jury can perform in making [the selection of the death penalty or rejecting it] is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (opinion of The Chief Justice, joined by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Whittaker).

391 U.S. at 520 n. 15. Guided by the standards prescribed by the statute, as construed and applied by the Texas Court of Criminal Appeals,[11] a Texas capital case jury that must answer the three punishment questions and thereby knowingly choose between a sentence of life or death "can do little more — and must do nothing less — than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois, supra,* 391 U.S. at 519-520.

In order to ensure that a jury will be able to fulfill its role as the conscience of the community, this "Court has un-

[11] *See* p. 8, *supra.*

ambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana, supra,* 419 U.S. at 527.[12] The exclusion from the venire of "identifiable segments playing major roles in the community", id. at 530, or of a "discernible class", *Peters v. Kiff,* 407 U.S. 493, 500 (1972), violates the fair-cross-section requirement of the Sixth Amendment because it "destroys the possibility that the jury will reflect a representative cross section of the community", *id.,* in that it results in a jury pool "not 'reasonably representative' of the community [and thereby] denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community." *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664 at 666 (1979) (footnote omitted).

Witherspoon addresses the jury function in sentencing in death penalty cases, and, in recognition of the Sixth Amendment right to a jury that is a representative cross

[12] The reasons why juries should be selected from panels reflecting the broadest community base are fully expressed in *Taylor* as follows:

> The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of ajudge. *Duncan v. Louisiana,* 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

419 U.S. at 530.

section of the community,[13] holds that the exclusion for cause of prospective jurors "simply because they have voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", 391 U.S. at 522, denies an accused due process of law. Since jurors in a capital case are selected to "express the conscience of the community on the ultimate question of life or death", id. at 519-520, it is essential that a capital jury be drawn from persons representing the divergent community views about the death penalty.[14] A jury " "[c]ulled of all who harbor doubts about the wisdom of capital punishment", *id.* at 520, "produce[s] a jury uncommonly willing to condemn a man to die." *Id.* at 521. If the determination of whether a man is to live or die is to be the true expression of the conscience of the community, the State cannot systematically exclude from a capital case jury all representatives of that part of the community whose oppose capital punishment but who "could nonetheless subordinate [their] personal views to what [they] perceive to be [their] duty to abide by [their] oath[s] as . . . juror[s] and to obey the law of the State." *Id.* at 514 n. 7.

[13]The Court did not explicitly rely on Sixth Amendment cases in *Witherspoon* because *Duncan v. Louisiana, supra,* decided two weeks before Witherspoon, was held non-retroactive in *DeStefano v. Wood,* 392 U.S. 631 (1968), decided two weeks after *Witherspoon.* However, a Sixth Amendment rationale is woven tightly into the fabric of *Witherspoon.*

[14]It is, of course, proper for the State to be able to exclude from a capital jury any person who is irrevocably commited prior to trial to vote against the imposition of the death penalty regardless of the facts of the case, not because such person does not represent an 'identifiable segment' or 'discernible class' within the community, but because such person cannot abide by his oath as a juror to follow the law of the State and return a verdict of death in a proper case. *Witherspoon v. Illinois, supra,* 391 U.S. at 514 n. 7, 522 n. 21.

The post-*Furman* Texas capital punishment procedure uses the jury to securely maintain the "link between contemporary values and the penal system." *Id.* at 520 n. 15. Section 12.31(b) requires that prospective - jurors "be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony." During voir dire examination each prospective juror is explicitly told of the effect of the jury's answers to the three punishment questions.[15] A Texas jury knows that 'yes' answers to the three questions results in the imposition of a death sentence, whereas one 'no' answer requires a sentence of life imprisonment. The Texas capital punishment procedure, as construed by the Texas Court of Criminal Appeals, thrusts upon the jury the responsibility and duty of making the ultimate decision of life or death, despite the camouflage of the three punishment questions. Since the trial courts of Texas are bound by the jury's answers to the questions, under Article 37.071(e) the jury is the only and the final expression of the conscience of the community on the question whether the accused lives or dies.[16] It seems

[15]The Texas Court of Criminal Appeals assumed in *Hovila v. State, supra,* 532 S.W.2d at 294, and in *Hammett v. State, supra,* 578 S.W.2d at 704, that prospective jurors in capital cases would know the effect of their answers to the three punishment questions. Accordingly, the court held that it is not error for the prosecutor to explicitly advise venire members of what sentence is required in response to the jury's answers to the questions.

The voir dire examination in this case manifests these holdings. Each prospective juror was explicitly told that 'yes' answers to all three questions required a mandatory death sentence and that a 'no' answer to any one of the questions required the imposition of a life sentence.

[16]Texas does not provide for a review by either the trial courts or the appellate courts of the propriety of the death penalty in each case, nor does it provide for the comparative appellate review found in the death penalty procedures of other states. See *Proffitt v. Florida, supra,* 428 U.S. at 252-253; and *Gregg v. Georgia, supra,* 428 U.S. at 167.

axiomatic that because a Texas capital jury knows precisely what result — life or death — its answers to the three punishment question will bring, the selection of such a jury should be governed by the same constitutional rule that controls the selection of a jury "empowered . . . to answer 'yes' or 'no' to the question whether [a] defendant [is] fit to live." *Witherspoon v. Illinois, supra,* 391 U.S. at 522 n. 20. The fact that Texas utilizes three punishment questions, the answers to which require a life or death sentence, rather than putting the life or death question to the jury directly, as in the Illinois procedure involved in the *Witherspoon* decision, is a difference without a distinction. By providing that jurors be told during voir dire examination of the effect of their answers to the punishment questions and by making those answers binding as to the punishment to be assessed, the Texas procedure has retained the jury's discretionary input into the sentencing part of a capital case. *Witherspoon* is therefore essential to secure an accused's right to a jury representing a fair cross section of the community.

The punishment questions prescribed by article 37.071 focus a jury's attention on issues deemed relevant by the Texas legislature to the ultimate decision of life or death. But the answers to those questions, no less than a simple 'yes' or 'no' to the ultimate question, constitute nothing more than the expression of the conscience of the community on contemporary values and the penal system. The questions do not insulate jury discretion or the jury's function as the conscience of the community from the decision of whether the accused lives or dies. They call upon the jury to discharge its function as the community's conscience only in a more guided manner than existed under the pre-*Furman* scheme. This is amply reflected in the opinions of the Texas Court of Criminal Appeals upholding the imposition of the death

penalty in widely diverse factual circumstances, demonstrating that court's willingness to be bound by a jury's findings on the punishment questions as being reflections of the community conscience.[17] Thus, to the extent that the jury is endowed with considerable discretion in answering the three punishment questions, *Witherspoon* is required to ensure that an accused facing the death penalty has at least the opportunity to have on his jury persons who, while they may have doubts about capital punishment, will conscientiously deliberate the punishment questions under the facts of the case and the law of Texas.

The factors enumerated above — that the jury answers the punishment questions knowing the effect of their answers; that the questions are designed, and have been construed by the Court of Criminal Appeals to allow the jury substantial discretionary input in arriving at the fateful answers to the punishment questions; that neither the trial court nor the Texas Court of Criminal Appeals may override the jury's answers to the punishment questions; and that the trial court is accorded wide discretion in admitting and excluding evidence at the punishment phase of the trial — coalesce to establish that jury discretion inherent in sentencing in Texas capital cases requires the same potential for a representative, cross section of the community jury that compelled the holding in *Witherspoon.* The conscience of the community has not been exorcised from sentencing in Texas capital cases; it has only been channeled into three specific areas in response to *Furman.* To allow the State to strike from the pool of prospective jurors persons who are qualified under *Witherspoon,* but who are not qualified under Section 12.31(b), permits exclusion of prospective jurors on a "broader basis", *Witherspoon v. Illinois, supra,* 391 U.S.

[17] See nn. 6 & 7, *supra.*

at 522 n. 21, than is necessary to accomplish the legitimate purposes of jury selection in a Texas capital case. The State's use of Section 12.31(b) clearly "dilute[s] the quality of community judgment represented by the jury", *Taylor v. Louisiana, supra,* 419 U.S. at 535, in an especially critical way. It deprives a defendant facing the death penalty of *Witherspoon*-qualified jurors in the jury's deliberation of the punishment questions.[18] Whatever else may be said about the Texas capital punishment procedure, it is not a mechanical procedure that strips the jury of discretion in deciding whether the defendant shall live or die to the extent that *Witherspoon*-qualified jurors are no longer necessary as components of a representative jury.[19] Texas capital case juries, from whose membership are struck persons qualified under *Witherspoon* but disqualified under Section 12.31(b), are no less organized to vote for the death penalty than was Witherspoon's jury. To protect against this invasion of an accused's right to a trial by jury guaranteed by the Sixth Amendment, *Witherspoon* must be held applicable to the Texas capital punishment procedure.

B.

In *Davis v. Georgia, supra,* this Court reversed a death sentence imposed under the Georgia post-*Furman* death penalty procedure because of the improper exclusion of a

[18]If the fiction is indulged that juries in Texas capital cases merely answer questions and do not assess punishment, the exclusion of *Witherspoon*-qualified jurors under Section 12.31(b) is more egregious because such an exclusion is based upon grounds wholly irrelevant to any task the jury is asked to perform.

[19]Venireman Jenson noted that if the Texas capital punishment procedure were devoid of discretion to the extent that human feelings should not be a part of the jury's sentencing function, it would be better to use computers instead of people as jurors. VD 370.

Witherspoon-qualified juror.

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," 391 U.S. at 522 n. 21, he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Id. at 123. Inasmuch as the Texas post-*Furman* death penalty procedure is qualitatively similar to the Georgia post-*Furman* death penalty procedure (for both procedures were approved in *Jurek* and *Gregg,* respectively, upon the same basis), any question as to *Witherspoon's* applicability to the Texas procedure should be controlled by the decision in *Davis.* The only distinction between the *Jurek*-approved procedure and the one approved in *Gregg* is that Texas vests greater and more absolute sentencing discretion in the jury than does Georgia,[20] giving greater compulsion for holding *Witherspoon* applicable to the Texas capital punishment procedure.

CONCLUSION

Despite early pronouncements of the Court of Criminal Appeals that "that *Witherspoon* test remains the same"[21] and "that the holding of *Witherspoon v. Illinois,* [*supra*], [is] alive and well in light of the new statutory scheme providing for the imposition of the death penalty",[22] that court has unmistakably buried *Witherspoon.* That court has improperly elevated Section 12.31(b) above the constitutional rule announced in *Witherspoon* and thereby permits the

[20]*See* n. 16 *supra.*

[21]*Hovila v. State, supra,* 532 S.W.2d at 294; and *see White v. State,* 543 S.W.2d 104, 106 (Tex.Crim.App. 1976).

[22]*Woodkins v. State, supra,* 542 S.W.2d 855, at 862 (Tex.Crim.App. 1976).

exclusion of *Witherspoon*-qualified jurors from capital cases. The Texas death penalty procedure does not justify abolition of *Witherspoon* nor the exclusion of prospective jurors who have general objections to capital punishment on the broader, Section 12.31(b) basis than is permitted by *Witherspoon.* For the reasons stated herein, and to faithfully adhere to the *Davis* decision, this Court should hold that *Witherspoon* is fully applicable to the Texas death penalty scheme, and the Court should apply *Witherspoon* in this case.

II.

Section 12.31(b) excludes a prospective juror from service in a capital case unless he will state "under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberation on any issue of fact."[23] The Court of Criminal Appeals has consistently held that this statutory requirement is wholly distinct from *Witherspoon.* A prospective juror in a Texas capital case may be disqualified from service by Section 12.31(b) regardless of whether he qualifies under *Witherspoon;* indeed, a prospective juror disqualified under Section 12.31(b) does not even have to be questioned as to the *Witherspoon* standards, *Bodde v. State,* 568 S.W.2d 344, 348 (Tex.Crim.App. 1978), because even if he qualifies under *Witherspoon* he may be excused upon the ground that he is disqualified under Section 12.31(b). *Whitmore v. State,* 570 S.W.2d 889, 892-893 (Tex. Crim.App. 1976).

[23]*See* footnote 2, *supra.*

Witherspoon permits the exclusion for cause of only those prospective jurors who make it

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*

391 U.S. at 522 n. 21. (Emphasis original). The specific holding of *Witherspoon* was that where venire members were excluded from jury service "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", *id.* at 522, imposition of the death penalty violated the Due Process Clause of the Fourteenth Amendment.

The voir dire examination of prospective jurors in the petitioner's case reveals numerous instances where *Witherspoon* was violated through application of Section 12.31(b). Mrs. Francis Mahon said she had always been in favor of the death penalty and that its application in this type of case (murder of a police officer) was appropriate. VD 33-35. Mr. Forrest Jenson said he felt that society needed the death penalty, VD 351, and that he could personally vote for it, VD 354. Nelda Coyle had always been in favor of the death penalty, VD 1023, and could personnally vote for death. VD 1025. Bobbie Andrews believed in the death penalty, but did not want to have to vote for it herself. VD 2697. These venire members never retreated from their respective position favoring the death penalty.

However, each of these prospective jurors was eventually excused pursuant to Section 12.31(b) when they each indicated they could not swear, as required by Section

12.31(b), that the mandatory penalty of life imprisonment or death would not affect their deliberations on any fact issue. Juror Mahon first stated she did not feel that her fact deliberations would be affected by the mandatory penalties. VD 65. When pressed further, she only said that she just did not know as an absolute fact whether she would be so affected. VD 67. Because Mahon felt it *could* affect her, she stated she could not take the oath requiring her to swear unconditionally that it would not affect her. VD 68. Venireman Jenson felt he could not take the oath because the fact that the death penalty was a possible punishment meant to him that he could not "take it lightly" and that he would have to be "pretty certain" as to how he decided the facts. VD 367. Jenson stated that he could not swear he would not be affected because he was "just human like everybody else", VD 368, and that the prosecutor "might as well get a computer to sit on the jury" if personal feelings could not enter into the deliberations. VD 370. Like Mr. Mahon, Nelda Coyle indicated that she could not unequivocally state under oath that she would not be affected because she did not know for a fact whether she would be affected. VD 1064-1065, 1067. And to Bobbie Andrews, the possible penalty of death required that her "feelings" would enter into her deliberations. VD 2708. She therefore could not take the oath that her "feelings" would not affect her decisions as a juror in a capital case. VD 2719-2720.

Mrs. Lloyd White was in favor of the death penalty but did not want to be personally involved in its imposition. VD 1530. She could not take the oath required by Section 12.31(b) because she was not completely certain whether she would be affected by the mandatory penalties. VD 1536. Mr. Curtis Williams was equivocal throughout the voir dire examination as to his feelings about the death penalty in

general and his participation in the necessary fact determinations required by the Texas procedure. VD 2577, 2586-2588, 2592, 2596-2697. Because he thought his deliberations would be affected by the death penalty as a possible punishment, VD 2598, Williams was excused. Penny J. McDonald said she did not belive in capital punishment, VD 4496, but she indicated that she could vote for the death penalty under the proper circumstances. VD 4497-4498, 4506. McDonald said she would not be affected by the penalty in determining guilty or innocence, but she could not swear that she would not be affected in answering the three punishment questions. VD 4530, 4550-4551, 4559.

All of these prospective jurors were qualified under *Witherspoon*. It was never unmistakably established that any one of them was so irrevocably opposed to the death penalty that he would automatically vote against its imposition regardless of the evidence.[24] Prospective jurors Jenson, Williams and Andrews concluded that they would be affected by the mandatory penalty in some unexpressed way. Jenson, VD 370; Williams, VD 2598; Andrews, VD 2697. In contrast, Prospective jurors Mahon, Coyle, White and McDonald could not qualify under Section 12.31(b) only because they had no previous experience as jurors in a capital case and thus could not say for certain whether they would be affected in any way. Mahon, VD 67; Coyle, VD 1064-1065; White, VD 1536; McDonald, VD 4550-4551,

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[24]Although most of the prospective jurors were not directed by the prosecutor's interrogation to the application of Section 12.31(b) to the jury's deliberative function on the petitioner's guilt or innocence, prospective juror McDonald expressly stated that the mandatory penalty would in no way affect her deliberation as to guilt/innocence. VD 4530. She clearly passed the second exclusion test of *Witherspoon* in that the death penalty would not prevent her from making an impartial decision as to the defendant's guilt.

4559.[25]

Witherspoon, Boulden v. Holman, 394 U.S. 478 (1969), *Maxwell v. Bishop,* 398 U.S. 262 (1970), and *Davis v. Georgia, supra,* all involved prospective jurors who were in various degress opposed to capital punishment. The exclusion of prospective jurors Mahon, Jenson, Coyle and Andrews presents the most egregious violation of *Witherspoon* because each of these prospective jurors expressly *favored* the death penalty. This anomaly is due to the interpretation of Section 12.31(b) by the Court of Criminal Appeals. Without discussion or analysis, that court held for the first time in *Moore v. State, supra,* that Section 12.31(b) operated totally independent of the *Witherspoon* test. This holding was reaffirmed one week later in the court's original opinion in *Whitmore v. State, supra,* wherein the original majority said that it was "of no consequence" that a prospective juror was not qualified under *Witherspoon,* but excused under Section 12.31(b). Not until *Shippy v. State, supra,* did a member of the Court of Criminal Appeals contest the majority's disregard for *Witherspoon.* Recognizing the tension between *Moore* and its progeny, and *Witherspoon,* Judge Roberts noted in his dissenting opinion that to be 'affected' by the mandatory penalties prescribed by the statute is not necessarily an irrevocable commitment to vote against the death penalty in

[25]It would appear that prospective jurors Mahon. Coyle, White and McDonald would also have been unable to take the Section 12.31(b) oath had it been phrased in the affirmative, i.e, whether he or she could state "under oath that the mandatory penalty of death or imprisonment for life *would* affect [his or her] deliberations on any issue of fact." These persons simply did not know if they would be affected or, if so, how they would be affected. A brief review of the voir dire examination of these venire members will reveal that their indecisiveness was due in large part to their uncertainty as what exactly was meant by the term 'affect', which has yet to be defined by the Court of Criminal Appeals.

all cases, as is required before exclusion is permitted by *Witherspoon.*

> It is readily apparent that a person who generally objects to the death penalty because of conscientious and religious scruples against its infliction will have his determination of fact affected by such belief. But if such "affectation" does not amount to an unambiguous and irrevocable commitment to vote against the death penalty in all cases, such individual cannot be constitutionally challenged for cause under *Witherspoon.*

556 S.W.2d at 262.

Just this sort of constitutionally unacceptable 'affectation' that concerned Judge Roberts is reflected in the voir dire examination in this case. Neither the trial court nor the Court of Criminal Appeals equated Section 12.31(b) with *Witherspoon.* As a result, not only were venire members with mere conscientious or religious scruples against the death penalty removed from the jury panel in this case (those being White, Williams and McDonald), but four persons who were expressly in favor of the punishment were also excused (those being Jenson, Mahon, Coyle and Andrews). This absurd result at least serves to elucidate the ambiguity in the meaning of 'affect' as used in Section 12.31(b).

The application of Section 12.31(b) in the petitioner's case violated *Witherspoon* because the trial court excluded *Witherspoon*-qualified jurors from the petitioner's jury under Section 12.31(b), which is a broader basis for exclusion than is permitted under *Witherspoon.* 391 U.S. at 522 n. 21. The improper exclusion of any one of the aforementioned prospective jurors in violation of *Witherspoon* requires a reversal of the judgment of the Court of Criminal Appeals insofar as it imposes the death penalty. *Davis v. Georgia, supra.*

CONCLUSION

The voir dire examination in this case clearly discloses that several prospective jurors were excluded on a broader basis than is permitted by *Witherspoon*, to-wit: under Section 12.31(b). Under these circumstances, the imposition and carrying out of the death penalty in this case is volative of the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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